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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

JOHNATHON IRISH,

Defendant.

\* \* \* \* \*

No. 1:19-cr-00251-LM-1

February 6, 2020

9:50 a.m.

TRANSCRIPT OF STATUS/SPECIAL HEARING

BEFORE THE HONORABLE LANDYA B. McCAFFERTY

APPEARANCES:

For the government: AUSA Anna Z. Kraskinski  
AUSA Kasey Weiland  
United States Attorney's Office

For the Defendant: Benjamin L. Falkner, Esq.  
Krasnoo Klehm & Falkner LLP

Court Reporter: Brenda K. Hancock, RMR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1454

P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court. The Court has before it for consideration today a status hearing in criminal case 19-cr-251-01-LM, United States versus Jonathan Irish.

THE COURT: All right. Let me just get my papers organized here.

All right. Let's deal with -- and I may not be able to resolve it right now, but I'd just like to hear the arguments with respect to the defendant's objection to the government's forfeiture jury instructions. That's Document 23. And then there's also a request for a supplemental jury instruction, Document 22. And then and then I want to ask about the unanimity instruction the government's requesting with regard to the guns. So, proof by clear and convincing evidence or a preponderance of the evidence, and you're saying it's clear and convincing evidence.

MR. FALKNER: Your Honor, I mostly filed it because I wanted to flag it early for your Honor. I did just look at the statute itself, and the statute itself appears to require a finding by clear and convincing evidence and a finding that that particular item that's to be forfeited was intended for use in the commission of the offense. I think the government's instructions request both by a preponderance of evidence in that the item was involved in the offense, which is, I think,

1 not the same standard as set forth in the statute. I very  
2 quickly, I tried to do a little bit of research. I didn't find  
3 any definitively one way or the other, but I wanted at least  
4 for your Honor to be aware of it, but I think that that's the  
5 proper standard.

6 THE COURT: And you're looking at 924 and you're  
7 looking specifically at (d)(1)?

8 MR. FALKNER: That's correct, your Honor.

9 THE COURT: "Any firearm or ammunition involved in or  
10 used in any knowing violation of subsection" -- here it would  
11 be (g), or -- now, that looks, as I'm reading it -- again, this  
12 is the first time I'm really studying this, but it looks like  
13 the "where" is talking about "any offense referred to in  
14 paragraph 3 of this subsection, where such intent is  
15 demonstrated by clear and convincing evidence."

16 Has the government had time to study this issue?

17 MS. KRASINSKI: No, your Honor. I will note that  
18 footnote 4 of the government's proposed forfeiture instructions  
19 states that the language of 18 U.S.C. 924(d) regarding proof of  
20 intent by clear and convincing evidence isn't applicable to the  
21 forfeiture phase of a criminal trial because the only issue in  
22 forfeiture is nexus between the firearm and the offense, not  
23 criminal intent, which, if we get there, the jury will have  
24 found intent beyond a reasonable doubt. But, as we were  
25 discussing it this morning, Attorney Faulkner sort of tied it

1 into the instruction that you referenced earlier. We may not  
2 know which firearm they have found that he possessed if we have  
3 a unanimity instruction. So, I think it's something that both  
4 Attorney Faulkner and I are going to have to look into it a bit  
5 more.

6 THE COURT: All right. Well, I appreciate that, then.  
7 I just wanted to touch base with you on it and just see if you  
8 had any feel for that.

9 Okay, then. Number 22 is talking about adding to the  
10 definition the frame or receiver of a firearm. What's your  
11 position on that?

12 MS. KRASINSKI: So, this is actually a broader issue  
13 we wanted to raise with the Court today. As the Court is  
14 generally aware, the government typically proves nexus by  
15 explaining -- having an ATF expert explain that the firearm was  
16 manufactured out of state and shipped into the state. That's  
17 typically the way it's done.

18 With one of the firearms here, it's sort of an  
19 AR-style rifle, and there is developing case law, a case from  
20 the Northern District of Ohio from December where the District  
21 Court found that the lower receiver of this type of rifle is  
22 not a firearm. So, that's sort of where that instruction comes  
23 in. We anticipate that the defense is going to argue that the  
24 government can't meet its burden of proof on the nexus  
25 requirement with that rifle because the lower receiver, when it

1 traveled in interstate commerce, wasn't a completed firearm, it  
2 was just a portion of a firearm, and that it was manufactured,  
3 you know, attached to the upper here in New Hampshire, and so  
4 it didn't -- the firearm itself didn't cross state lines.

5 In this case, however, as it relates to that firearm,  
6 we intend to prove nexus sort of differently than we normally  
7 would. As your Honor knows, the statute requires that -- it  
8 prohibits a felon from possessing a firearm to ship or  
9 transport in interstate or foreign commerce or possess in or  
10 affecting commerce any firearm or ammunition.

11 Here there's going to be testimony that the defendant  
12 modified that firearm, that he put on additional sights to the  
13 firearm, that he put a flashlight on the firearm, that  
14 flashlight requires batteries, that his possession of this  
15 AR-style rifle affected interstate commerce, and I am working  
16 on preparing a supplemental jury instruction that sort of lays  
17 out -- that lays this out and also cites the authority for it.

18 It's sort of a different case. I don't know how  
19 familiar you are with firearms, your Honor.

20 THE COURT: No, I'm not, not that familiar.

21 MS. KRASINSKI: So, I have --

22 THE COURT: And there's case law that would suggest  
23 that his modifications in the State of New Hampshire would  
24 actually affect interstate commerce?

25 MS. KRASINSKI: Yes, your Honor.

1 THE COURT: Okay.

2 MS. KRASINSKI: So, most recently the issue has come  
3 about in relation to what are called "ghost guns," guns that  
4 people are manufacturing sort of in their homes that never  
5 cross state lines and whether or not the possession of that  
6 type of firearm affects interstate commerce, and what Courts  
7 have been holding is that, because there is a broader market  
8 for firearms, there is a national and international market,  
9 that the possession of that firearm, even though that firearm  
10 never crossed state lines, affects interstate commerce, and  
11 I'll add all of that --

12 THE COURT: Is it Circuit case law as well as District  
13 Courts?

14 MS. KRASINSKI: Yeah. Yes.

15 THE COURT: Okay.

16 MS. KRASINSKI: So, there's a Ninth Circuit case  
17 related to homemade machine guns. And it's all based on a  
18 Supreme Court case that actually discusses whether or not the  
19 Federal Government can regulate intrastate marijuana, and in  
20 that case the Supreme Court held that, because there is, legal  
21 or not, a broader interstate --

22 THE COURT: Market.

23 MS. KRASINSKI: -- marketplace for marijuana, that the  
24 government can still regulate intrastate marijuana, because it  
25 impacts that broader market.

1           THE COURT: Can I ask a bigger question? Aren't there  
2 multiple guns alleged?

3           MS. KRASINSKI: There are multiple guns alleged.

4           THE COURT: So, why wouldn't you just -- and let me  
5 ask you this: Are the guns -- I don't know anything about the  
6 facts. Are the guns all located in the same place?

7           MS. KRASINSKI: They were all seized from the same  
8 location, yes.

9           THE COURT: Okay. So, it's not a question of one gun  
10 is in this room, one gun is in that car. They're all together  
11 when they're seized?

12          MS. KRASINSKI: Correct.

13          THE COURT: Okay, so --

14          MS. KRASINSKI: So, why does it matter?

15          THE COURT: Yeah.

16          MS. KRASINSKI: There are sentencing issues that  
17 relate to this. There were extended magazines found that fit  
18 with this firearm. That is a sentencing enhancement, if we  
19 prove it. There are sentencing enhancements if the offense  
20 involved three firearms. So, it's certainly something that we  
21 could -- you know, we could take this one firearm out, or the  
22 jury could find that we haven't met our burden of proof with  
23 relation to this firearm, but this actually ties into why we  
24 have proposed the unanimity requirement, because we anticipate  
25 the defense will argue that we can't meet our burden of proof

1 with relation to this one firearm.

2 THE COURT: If they're all in the same place why would  
3 you need -- I could see if they're in different places needing  
4 a unanimity instruction, but if they're all located in the same  
5 place and they're seized, why would the jury -- I think it  
6 would confuse the jury to be asked to decide with respect to  
7 each specific gun that was seized in one location and at one  
8 time.

9 MS. KRASINSKI: So, I don't think they need to decide  
10 with respect to each -- I guess somehow if the argument is,  
11 well, one of these is not a firearm, or one of these didn't  
12 travel in interstate commerce, we need to instruct the jury  
13 that, even if one of these firearms doesn't meet the nexus  
14 requirement or they find that it's not a firearm that they can  
15 still find him guilty if the other two firearms are firearms  
16 and are connected, you know, traveled interstate, that they  
17 don't need to find that all three are firearms and meet the  
18 nexus requirement. There may be a better solution than the  
19 unanimity requirement. I'm certainly open to suggestion.

20 THE COURT: Okay. So, there may be with respect to  
21 individual -- how many guns are there?

22 MS. KRASINSKI: There are three.

23 THE COURT: Three? That there may be an argument that  
24 you can't meet the element of interstate commerce.

25 MS. KRASINSKI: With regards to one of them, yes.



1           THE COURT: Okay. All right. This seems something  
2           worth further thought, research, thinking.

3           What do you have to say about it, Attorney Faulkner?

4           MR. FALKNER: I would just say that the government has  
5           charged the three and, while they were -- all three guns were  
6           seized in one location, they were not seized from the  
7           defendant; they were seized from another person after even by  
8           accepting what I expect to be the government's case. So, just  
9           a brief overview of what I expect to be the government's case  
10          is that the weapons were in the home that he shared with his  
11          wife for a period of time from December 27th, 2018, more or  
12          less, up until approximately October 25th of 2018. At that  
13          time his wife left him, and, according to several of the  
14          government's witnesses, at least in their interviews with the  
15          FBI, essentially he tried to get the firearms out of the house,  
16          and they went through a string of other people, and the federal  
17          officials tracked them down and seized them from a man named  
18          Gary Roy. So, they weren't seized from the defendant, they  
19          weren't seized at his home, they weren't seized in his  
20          presence.

21          THE COURT: Can you just back up a little bit and tell  
22          me -- the wife was living in the house, the wife leaves, and I  
23          missed what you said after that.

24          MR. FALKNER: According to several of the government's  
25          witnesses, when the wife leaves he starts making phone calls

1 saying --

2 THE COURT: He starts making phone calls?

3 MR. FALKNER: Correct.

4 THE COURT: Mr. Irish? That's what the government's  
5 case will --

6 MR. FALKNER: Correct. So, according to Peter Dugay,  
7 he asked Peter Dugay to take the firearms. He says, "No." He  
8 asks David Marcotte to take a box, and the firearms were seized  
9 out of a box, and David Marcotte says, "No." Ultimately, the  
10 firearms end up in the hands of a Neil Prive, and he says that  
11 Mr. Irish said, "Hey, take these firearms out of my house,"  
12 and Neil Prive actually did take the firearms out of the house,  
13 and then Neil Prive gave the firearms to Gary Roy.

14 THE COURT: And that's where the law enforcement --

15 MR. FALKNER: And the law enforcement seized the  
16 firearms from Gary Roy.

17 THE COURT: Okay. And they're all in the same box?

18 MR. FALKNER: They're in the same box, but -- so,  
19 there are other issues. So, two of the firearms -- there's a  
20 handgun, a 1911 is the name of the handgun, and then there's  
21 the rifle, and there's a shotgun. The handgun and the rifle  
22 had previously belonged to Mr. Irish and were seized by the  
23 government in the past and released to Roscoe Whitney. Mr.  
24 Whitney then, after Mr. Irish finished all of his sentences,  
25 returned the firearms, depending on how the evidence comes out,

1 to Mr. Irish and/or Mrs. Irish, and that's how they came to be  
2 in the Irish home. But that only involves the handgun and the  
3 rifle but not the shotgun. There's no evidence as to where the  
4 shotgun came from that I know of. So, theoretically, there's  
5 potentially proof issues as to the possession of the shotgun  
6 and potentially other issues as to the shotgun. As to the  
7 rifle, there's the issues vis-a-vis interstate commerce.

8 And then that leaves the handgun, and so potentially  
9 the jury may be left having to base its verdict only on the  
10 handgun, depending on how the testimony comes out and depending  
11 on the results of motions for judgment of acquittal and things  
12 like that. And it may or may not matter in the end to the  
13 jury's verdict, but it may matter in the end to the jury's  
14 verdict, because there is testimony also along the way about  
15 various -- various witnesses from the government may say that  
16 he was carrying, that he physically had the 1911 in his  
17 presence, on his person at various times, or there may be  
18 circumstantial evidence.

19 So, it's not just a matter of where they were seized  
20 from, but in the grand scheme of things I'm not sure that the  
21 three -- even though he's alleged to have possessed all three  
22 firearms over this extended period of time, there is  
23 potentially independent evidence as to each firearm.

24 THE COURT: Okay. What's the Ohio case? Do you have  
25 the cite for that?

1 MS. KRASINSKI: I do, and I actually have a copy for  
2 your Honor, if that would help.

3 THE COURT: Okay, that's great.

4 MR. FALKNER: And I have a Lexis cite for that case,  
5 your Honor, if that's helpful.

6 THE COURT: Sure.

7 MR. FALKNER: It's 2019 U.S. District Lexis 217016.

8 MS. KRASINSKI: The only thing I want to note about  
9 that case is that that case dealt specifically with only the  
10 lower receiver and not a completed firearm. May I approach?

11 THE CLERK: Oh, sure.

12 MS. KRASINSKI: This case involves a fully assembled  
13 rifle, as depicted in government's Exhibit 35b marked for  
14 identification purposes, but a full firearm. That case and the  
15 case law addressing whether or not a lower receiver meets the  
16 federal definition of a firearm is dealing with the lower  
17 receiver by itself, the portion that is depicted on the single  
18 web page that's printed. So, I just want to make sure that's  
19 clear when your Honor is looking at that, that what that Ohio  
20 case is dealing with is only the lower receiver component and  
21 not the entire assembled, fully functional firearm.

22 THE COURT: Okay. Go ahead, Attorney Faulkner.

23 MR. FALKNER: Yes, your Honor. I would point out that  
24 the contention isn't that the rifle isn't a firearm at the time  
25 that it's seized, but that the part that is shipped in

1 interstate commerce, according to the government's evidence,  
2 isn't a firearm. It may become a firearm at a later time, so a  
3 part of the firearm may have traveled in interstate commerce,  
4 but the firearm itself did not. And so, I understand the  
5 government to be now suggesting that they may be seeking some  
6 kind of broader instruction as to interstate commerce than that  
7 which they requested and that which is in the model  
8 instruction, but the model instruction at least talks about the  
9 firearm itself having traveled in interstate commerce. So, if  
10 a lower receiver is what traveled in interstate commerce and a  
11 lower receiver is not a firearm, then --

12 THE COURT: But can a portion of a unified object, if  
13 a portion of that traveled in interstate commerce is that  
14 sufficient?

15 MS. KRASINSKI: There's some case law that suggests  
16 that it is; there's some case law that suggests that it isn't.  
17 The model instruction only focuses on a portion of the statute  
18 itself. The statute is broader than the model instruction, and  
19 so we intend to submit a revised instruction that is more  
20 closely aligned with the wording of the statute itself rather  
21 than the model instruction, which only focuses on how the  
22 government traditionally proves the nexus element.

23 THE COURT: Okay. This is important enough and is  
24 something that needs to be briefed, and so what I'd like  
25 counsel to do is brief this issue, this sole issue with respect

1 to this particular rifle and that lower receiver and the case  
2 law on whether or not it qualifies.

3 Now, you're concerned enough about it that you've got  
4 another approach that you're going to take with respect to  
5 proving nexus.

6 MS. KRASINSKI: Yeah. I think our position is that  
7 we're establishing the nexus element by showing that his  
8 possession of the rifle affected interstate commerce.

9 THE COURT: Because he added onto it and made it --

10 MS. KRASINSKI: Right.

11 THE COURT: Okay. And you're saying there's solid  
12 case law on that?

13 MS. KRASINSKI: There is new emerging case law on it.  
14 I think it's based on a solid Supreme Court case, your Honor,  
15 discussing about it in the context of marijuana.

16 THE COURT: So, Attorney Faulkner, if that's the  
17 approach and the government is going to use that theory and  
18 that theory holds up, there's case law supporting it, then this  
19 becomes immaterial; is that right?

20 MR. FALKNER: It may, and it depends on -- the law  
21 does, I think, potentially go both ways. United States versus  
22 Lopez, the 1995 case, suggests at least with regard to  
23 firearms, that broader theory of the possession of a firearm  
24 can affect the market of firearms doesn't apply, and that  
25 struck down the statute which was possession of a firearm in a

1 school zone because -- and the argument that the government had  
2 made in that case was that possession of firearms affects the  
3 broader market. I'm not aware of any cases that deal with the  
4 interstate shipment of parts of a firearm.

5 THE COURT: Okay. Well, let's do this, then: I would  
6 say that we want briefing on both issues, the more conventional  
7 nexus theory, which Attorney Faulkner says doesn't hold water  
8 based on the new case out of Ohio. So, I'll need that issue  
9 briefed as well as the government's other, newer nexus theory  
10 that the government intends to propose. If you can brief the  
11 viability of that and the instruction, and if you can both file  
12 your briefs by tomorrow at 5:00 p.m. that would be very  
13 helpful.

14 MS. KRASINSKI: I'm happy to do that, your Honor, but,  
15 candidly, I have to say I think that the Ohio case is probably  
16 correctly decided. I think it is probably correct that the  
17 lower receiver itself does not constitute a firearm, and I  
18 think that -- so, I'm not sure --

19 THE COURT: So, you're not going to be even arguing  
20 that theory or that nexus theory?

21 MS. KRASINSKI: Correct, your Honor.

22 THE COURT: Okay. Well, that simplifies things, then.  
23 So, then brief the question of your alternative nexus theory  
24 and file that by 5:00 p.m. tomorrow.

25 MR. FALKNER: Your Honor, I just ask -- I have a

1 long-scheduled medical appointment with my son at 1:00 p.m. in  
2 Boston, and if I could --

3 THE COURT: Today?

4 MR. FALKNER: No, no, no, no, tomorrow afternoon at  
5 1:00 p.m., and so I may not be able to get it filed right at  
6 5:00 p.m. If it's filed by 6:00 or 7:00 would that be --

7 THE COURT: If you can file it by Saturday morning,  
8 I'll spend the weekend studying the issue, so if you can get it  
9 in by Saturday morning.

10 MR. FALKNER: Thank you, your Honor.

11 THE COURT: Yeah. All right. And I'll give you the  
12 same leeway.

13 MS. KRASINSKI: Thank you, your Honor.

14 THE COURT: All right. Now, and the unanimity issue,  
15 the unanimity question, I'll have to think about that issue as  
16 well, and I think if you can include that issue in your  
17 briefing that would be helpful to the Court. So, both the  
18 nexus issue and unanimity question.

19 All right. The stipulations in the case, I just want  
20 to go over those. There's a stipulation that Mr. Irish was  
21 convicted of a felony and knew it was a felony, and the  
22 government is going to at some point introduce that and either  
23 read it to the jury or have me read it to the jury, and then I  
24 give a separate instruction on that stipulation in the jury  
25 instructions.



1           Okay. The definition of a firearm there's no  
2 stipulation.

3           MR. FALKNER: No, your Honor. And could I just  
4 briefly inquire -- so, there are exhibits labeled  
5 "Stipulation," which are 1 and 2, which are not stipulations in  
6 this case. That's something different. But as to the  
7 stipulation that we reached about the felony status, the  
8 government has listed that as an exhibit. I don't necessarily  
9 have any position on it, only because we had discussed it with  
10 the government as to whether you intend it to be an exhibit or  
11 just read to the jury and a fact that the jury is to accept. I  
12 just flag the issue, because at some point it will come up. I  
13 don't necessarily object to it being an exhibit, but I don't  
14 know what your Honor's practice is.

15           THE COURT: That's easy. We can deal with that when  
16 it comes up, and I don't think that's an issue that's going to  
17 make or break anything. Ultimately, it does have to be read to  
18 them, it does have to be part of the evidence. How it comes  
19 in -- I think reading it to the jury is fine. If you want it  
20 also to be an exhibit, tell me why that's not feasible, kosher.

21           MR. FALKNER: I don't have an objection to it.

22           THE COURT: Okay. So, we'll just let the government  
23 decide how they're going to introduce that at the time.

24           MR. FALKNER: That's fine. I just want to be careful  
25 because that their Exhibits 1 and 2 are labeled as

1 stipulations, that somehow it's differentiated from the jury  
2 that those are not the same as stipulations as defined in your  
3 jury instructions.

4 THE COURT: Okay. Can you explain that, Attorney  
5 Krasinski?

6 MS. KRASINSKI: Sure, your Honor. The defendant was  
7 convicted in this court of aiding and abetting a straw purchase  
8 and lying to a federal agent. At the conclusion of that case  
9 he directed that his firearms, rather than the FBI retaining  
10 them, directed that they go to someone else, this individual  
11 Roscoe Whitney. So, in the context of that case in 2015 the  
12 defendant signed a stipulation saying, you know, "These were my  
13 firearms. I understand and agree that these will be turned  
14 over by the government to Roscoe Whitney."

15 And then, in the context of releasing these firearms,  
16 this individual, Roscoe Whitney, also filed what we're calling  
17 a "stipulation." I mean, it says, "I, Roscoe Whitney, do  
18 hereby stipulate the following," the fact that he takes  
19 possession of these firearms, he agrees not to return them to  
20 the defendant. So, I think we can address that in jury  
21 instructions when you're instructing --

22 THE COURT: Can I ask you a quick question? Which of  
23 these are the same guns as in this case?

24 MS. KRASINSKI: So, the 1911 handgun and --

25 THE COURT: Which is that? Because I'm looking at

1 Roscoe Whitney.

2 MS. KRASINSKI: 1 and 2.

3 THE COURT: 1 and 2?

4 MS. KRASINSKI: Yes, your Honor.

5 THE COURT: Okay. So, those same exact guns,  
6 firearms, appear in this case?

7 MS. KRASINSKI: Yes, your Honor.

8 THE COURT: Okay. Why does the jury need to see the  
9 other gun and the other ammunition? That's a stipulation  
10 dealing with a prior case. Certainly, the fact that Roscoe  
11 Whitney took personal possession, and he can testify to that,  
12 and if he's cross-examined his credibility is challenged on  
13 this, it seems to me, then, this would come in to rehabilitate  
14 his credibility, but --

15 MS. KRASINSKI: Are you talking about the entire  
16 stipulation itself or the firearms that are not at issue in  
17 this case?

18 THE COURT: I'm talking about the firearms not at  
19 issue. I don't know. I should let Attorney Faulkner raise  
20 objections to it, to the extent you have any. But I'm looking  
21 at it thinking that that may be his objection, that this would  
22 introduce further firearms and introduce prejudice.

23 Attorney Faulkner, go ahead.

24 MR. FALKNER: Well, I guess I do have a problem with  
25 -- so, in terms of this stipulation, which is Exhibit 1, I

1 guess --

2 THE COURT: We're looking at Exhibit 1 now?

3 MR. FALKNER: Or whichever exhibit you want to address  
4 first.

5 THE COURT: Okay. Exhibit 1 has references to guns  
6 and then ammunition.

7 MR. FALKNER: Right. And I guess I think Part 3  
8 should be redacted and redacted in a form that simply doesn't  
9 indicate that there's something missing, so rather than blacked  
10 out perhaps whited out or something to that effect.

11 THE COURT: So, you don't object to the actual  
12 document being admitted with redactions?

13 MR. FALKNER: I'm not sure that I can, because I think  
14 the government's theory is that these were his guns all along  
15 and that this is some evidence that they were his guns in the  
16 first instance.

17 THE COURT: Okay. And does the government, do you  
18 have any problem redacting the guns that aren't relevant to  
19 this case?

20 MS. KRASINSKI: So, on Exhibit 1 the only firearms  
21 listed are firearms relevant to this case.

22 THE COURT: Right.

23 MS. KRASINSKI: So, Paragraph 3 relates to ammunition.  
24 I think there will be testimony that witnesses who saw all of  
25 this stuff in the case that it was ultimately seized in still

1 had evidence tape on it, not the firearms themselves, but bags  
2 of ammunition, things like that. So, I think it is relevant to  
3 whether or not the defendant got all of this stuff that was  
4 once his was, we believe, given back to him. So, I think it is  
5 relevant in that broader context. The jury is going to hear  
6 evidence about all of the ammunition and magazines that were  
7 found in the case with these three firearms as well.

8 THE COURT: That makes sense to me, Attorney Faulkner,  
9 in terms of Exhibit 1. This is the problem with ruling on  
10 evidentiary questions before I hear the evidence --

11 MR. FALKNER: I know.

12 THE COURT: -- and out of context of evidence. So,  
13 look at Exhibit 1, if you would, and just are you okay with the  
14 admission of that at this point, as you understand the  
15 government's case?

16 MR. FALKNER: And I guess I would just reiterate the  
17 same thing. Even if there is other testimony, he's not  
18 contesting that they were his guns. We're not objecting to the  
19 fact that he owned these two guns. There's just no -- there's  
20 minimal, if any, probative value to the fact that there was  
21 also ammunition seized, and so, as a result of that, I think  
22 that Paragraph 3 ought to be redacted just under Rule 403, just  
23 because it's, again, we know he has the ammunition now, but  
24 he's not contesting that these were his firearms in the first  
25 instance. So, as a result of that, I think under 403 that

1 third paragraph referencing the ammunition ought to come out.

2 THE COURT: All right. And you want to keep it in?

3 MS. KRASINSKI: Yes, your Honor.

4 THE COURT: Okay. All right. I'm not seeing huge  
5 prejudice with respect to Paragraph 3 of the first exhibit, but  
6 I'm going to withhold ruling on that until we hear the evidence  
7 and I can make a ruling in the context of the evidence. I  
8 think Exhibit 2 -- now, Exhibit 2 has a gun and ammunition that  
9 are not part of this case; is that right?

10 MR. FALKNER: That's right.

11 THE COURT: And you're not objecting to 1 and 2. It's  
12 just 3 and 4.

13 MR. FALKNER: Correct. There's another problem with  
14 Exhibit 2 that we can get to.

15 THE COURT: Okay. Go ahead.

16 MR. FALKNER: On Page 2 I'm concerned about Paragraph  
17 3 and, in particular, about the second sentence of Paragraph 3.

18 THE COURT: Okay. Go ahead.

19 MR. FALKNER: And my main concern about that, I do  
20 expect -- well, I shouldn't say "I expect." I don't know  
21 whether Roscoe Whitney will testify or not. He has counsel.  
22 But assuming that he does testify, and assuming -- certainly  
23 there may well be cross-examination about the fact that he knew  
24 he wasn't supposed to return these guns to him, but to suggest  
25 that giving the guns constituted -- would constitute him aiding

1 and abetting the crime of being a felon in possession sort of  
2 tells the jury, in essence, that that is the crime that has  
3 been committed here and that's what the jury is here to decide.  
4 So, I think, one, it's a danger of confusing and/or misleading  
5 the jury and also a danger of unfair prejudice. It's  
6 essentially -- it's saying it could constitute that crime,  
7 which invites the jury to speculate, and there's really, I  
8 don't see any probative value to that evidence.

9 THE COURT: Let me hear from the government.

10 MS. WEILAND: On that point, your Honor, a few things  
11 the government would say. First of all, the government's  
12 position is that this is simply sort of baked into  
13 Mr. Whitney's dealings with the FBI in terms of the release of  
14 weapons to him and the circumstances surrounding that release,  
15 his understanding of the limitations, you know, that were  
16 imposed on him. He was given this admonishment by the FBI.  
17 So, on the one hand, it's just sort of baked into his dealings  
18 with the FBI in regards to receiving the firearms.

19 The witness -- we're not seeking to introduce evidence  
20 that the witness has been charged with aiding and abetting the  
21 possession of a firearm by a felon, and, in fact, this witness  
22 hasn't been charged with that. I could see the introduction of  
23 that type of evidence being perhaps, you know, prejudicial in  
24 the sense that it presupposes that the defendant has committed  
25 this crime, but that's not what the government is seeking to

1 introduce. It's simply the mere fact that he was admonished  
2 that doing so could constitute a crime I don't think  
3 presupposes that the defendant has committed that crime.

4 But third, your Honor, and most importantly, as  
5 Attorney Faulkner has said, we fully expect that Mr. Whitney  
6 will be cross-examined on the legality of his conduct in regard  
7 to the firearms. And so, to the extent that Attorney Faulkner  
8 intends to elicit that testimony anyway, I don't see how the  
9 introduction of this document adds any additional prejudice  
10 that might already be suggested by cross-examination on that  
11 topic.

12 Now, if Attorney Faulkner stated that he wanted to  
13 avoid that line of questioning entirely and not cross-examine  
14 Mr. Whitney on the legality of his own conduct in regards to  
15 this case, then I could see redacting that portion of the  
16 stipulation. But to the extent that that line of questioning  
17 is coming in, which Attorney Faulkner has represented that he  
18 would elicit testimony like that, I don't see how this adds to  
19 or creates any unfair prejudice.

20 THE COURT: Go ahead.

21 MR. FALKNER: Just briefly in response, I'm not sure  
22 that I can elicit testimony as to the legality or illegality of  
23 any conduct. I think I can elicit testimony as to the conduct  
24 itself, and whether he's concerned about legal consequences  
25 could potentially be relevant to bias, but whether conduct is



1 actually legal or illegal, I don't think any witness can  
2 testify to the legality or illegality of his own conduct. So,  
3 I'm not sure why the government document would be able to do  
4 what a witness cannot do.

5 THE COURT: Okay. It looks like Stipulation 1 --  
6 calling them "stipulations" does seem problematic, because,  
7 obviously, there are stipulations that Mr. Irish has entered  
8 into for this trial, so I think we'll have to deal with that  
9 issue.

10 But Exhibit 1 is clearly highly relevant with respect  
11 to Mr. Irish's stipulation that the guns were his. Again, he's  
12 not contesting that in this trial. So, this exhibit, it seems  
13 to me Roscoe Whitney is going to be testifying, and to the  
14 extent some issue comes up that would challenge something that  
15 he has said in this stipulation or his credibility -- and,  
16 again, I just don't know the facts well enough -- but  
17 ultimately it seems to me this could easily become relevant  
18 somehow based on what Mr. Whitney testifies to. But I'm not  
19 sure I'm seeing the relevance beyond -- he tells his story. As  
20 you said, as part of his dealings with the FBI he testifies to  
21 those facts, and assuming those facts aren't really challenged,  
22 I'm not seeing the need for the jury to actually see the signed  
23 stipulation, but I could see it becoming relevant perhaps to  
24 rehabilitate him somehow.

25 MS. WEILAND: The one thing I will note, your Honor,

1 is it does include a clear identification of the firearms and  
2 the fact that two of the firearms are identified by serial  
3 number that these were the same guns that were released to  
4 Roscoe Whitney are the same guns that are at issue in this  
5 case.

6 THE COURT: Okay. And if that becomes an issue, if  
7 that somehow is challenged, which he's stipulating that he was  
8 a felon, he's stipulating that he knew he was a felon, and with  
9 respect to Exhibit 1 he has stipulated to ownership of at least  
10 those two guns listed in Stipulation 1, Exhibit 1, and what  
11 Roscoe Whitney has stipulated to with respect to guns does not  
12 seem as relevant in terms of the documentary evidence at  
13 Exhibit 2, but I could see it coming in, I could see it  
14 becoming relevant. That's my take on it without the benefit of  
15 the context of the trial. So, obviously, I'm just giving you a  
16 sense of my initial impression with regard to Exhibits 1 and 2.

17 It looks like you've agreed, however, on most of the  
18 other exhibits. There are only some that are still marked with  
19 ID.

20 MS. KRASINSKI: Yeah. I will note that there are two  
21 that I inadvertently removed the ID from, and I will file an  
22 amended list. 29a and 29r should still be marked for  
23 identification purposes, but the remainder where the ID has  
24 been stricken are accurate.

25 THE COURT: All right. And are there any other

1       evidentiary issues with respect to these exhibits that we  
2       should go over now so that I have a heads-up on them and I can  
3       do some research, I can take less of the jury's time when the  
4       issue happens to come up during the trial?

5               MR. FALKNER: The motions *in limine* that were filed  
6       with regard to Exhibit 4 and Exhibit 34.

7               THE COURT: Those are going to be the main issues?  
8       Okay. All right.

9               MS. KRASINSKI: And then I have one just sort of minor  
10       issue. As you'll note on the exhibit list, there are a number  
11       of exhibits that are marked by ".r."

12              THE COURT: Yes.

13              MS. KRASINSKI: Sort of redacted versions. For  
14       purposes of the trial, and I've discussed this with counsel, we  
15       intend to use the non-redacted versions, but for purposes of  
16       what is then publicly available in the Clerk's Office, some of  
17       these have information that, while relevant for the jury's  
18       purposes, people's phone numbers, things like that, shouldn't  
19       necessarily be in the public record.

20              So, under Rule 49.1(f) of the *Federal Rules of*  
21       *Criminal Procedure*, to the extent that an exhibit that has that  
22       information, for example, Exhibit 4, if it's admitted, or some  
23       of these other, you know, Exhibit 29A, if they are admitted at  
24       trial, I would ask that for purposes of the record after trial  
25       that they be sealed and that the redacted version be the

1 publicly accessible version.

2 THE COURT: Okay. So, anything that is marked with  
3 ".r" is the version that would go in the public record?

4 MS. KRASINSKI: Correct, your Honor.

5 THE COURT: All right. Is that all right with you in  
6 terms of procedure, Attorney Esposito?

7 THE CLERK: I think so, your Honor. I think it's  
8 okay.

9 THE COURT: All right. And before we get to the  
10 evidentiary motions *in limine*, Roscoe Whitney, I went ahead and  
11 appointed counsel just so that this can go smoothly and counsel  
12 can at least consult with him before we begin the trial,  
13 hopefully. Can you give me an update on him, his arrival time?  
14 I know Attorney Reese has agreed to represent him if, in fact,  
15 he wants a lawyer.

16 And just suggest to me the procedure you would prefer  
17 in terms of how to handle Mr. Whitney, and, obviously, it would  
18 be done outside of the presence of the jury, but what would be  
19 your preferred approach to Mr. Whitney? Obviously, number one,  
20 does he even want a lawyer, does he qualify for appointed  
21 counsel? Obviously, I've made the appointment because I don't  
22 want there to be any delay. So, I would need to find out what  
23 his position is with respect to an attorney, and then, if he is  
24 going to testify, then I would need to go through some sort of  
25 colloquy with him about his Fifth Amendment rights and his

1 waiver of his right to counsel, even, I think. What are your  
2 preferred methods?

3 MS. KRASINSKI: So, I understand that he met with  
4 counsel yesterday. We intend to meet with him and counsel  
5 today. We have not done so yet, but we intend to, and, once  
6 it's executed I'll provide a copy to defense counsel, grant him  
7 immunity. He will be testifying, so once those documents are  
8 executed we'll get a copy to Attorney Faulkner.

9 THE COURT: Okay. So, the government will be actually  
10 granting him immunity to testify?

11 MS. KRASINSKI: Yes, your Honor.

12 THE COURT: Okay. All right. That's important to  
13 know. All right.

14 MR. FALKNER: And, your Honor, that's the first that  
15 I've learned of that. I would just -- I think there may be  
16 appropriate jury instructions that need to be addressed.

17 THE COURT: We will look into that and add those as  
18 well. All right. But at least that probably is going to  
19 obviate the whole issue of the Fifth Amendment, so I am glad I  
20 did appoint him counsel ahead of time to help advise him on  
21 that.

22 All right. Let's go through, then -- any other issues  
23 out there that you want to raise before we get into the motions  
24 *in limine*?

25 MS. KRASINSKI: There are two other issues. One of

1 the government's witnesses is Neil Prive. He had a substance  
2 abuse problem. He has been clean for approximately 15 months.  
3 He was clean for the purposes of all of the time frame alleged  
4 in this indictment. So, what we have discussed with Attorney  
5 Faulkner is outside of the presence of the jury inquiring as to  
6 whether he remains sober, and if he is not delving into that in  
7 front of the jury, if he has had a relapse, that obviously is  
8 something that will be discussed in front of the jury. But  
9 because he has been clean for 15 months and was not using  
10 during the time period alleged in the indictment, that's the  
11 procedure that we've agreed to.

12 THE COURT: You've agreed to that, then, Attorney  
13 Faulkner?

14 MR. FALKNER: To the voir dire out of the presence of  
15 the jury? I believe that that's correct, and my reasoning on  
16 it, your Honor, is this: In previous cases my understanding of  
17 the case law is that a witness can be examined as to substance  
18 use if they were using a substance at the time of their  
19 perception of events or if they were using a substance at the  
20 time they're testifying but not necessarily based on just past  
21 use or at other times. I don't necessarily have a good-faith  
22 basis to be able to ask him if he's currently using substances  
23 in front of the jury, but I think, given the extent of his  
24 substance abuse history, if we could voir dire him, I think  
25 that would be appropriate.

1 THE COURT: Okay. And just let you voir dire him out  
2 of the presence of the jury? Is that what you're asking?

3 MR. FALKNER: Correct.

4 THE COURT: Okay. And it would be essentially  
5 confirming that he was clean and sober for the 15 months that  
6 are relevant. Are there 15 months, is the span?

7 MS. KRASINSKI: Well, he has been clean for  
8 approximately 15 months.

9 THE COURT: Okay. And so, you would establish that  
10 through questions and then whether or not he has had any  
11 relapses and whether he's currently clean and sober.

12 MR. FALKNER: Yes.

13 THE COURT: Okay. All right. Thank you for bringing  
14 that to my attention. Anything else?

15 MS. KRASINSKI: One other issue.

16 THE COURT: Yes.

17 MS. KRASINSKI: We anticipate that one of the  
18 witnesses, Peter Dugay, will testify that he was driving in a  
19 vehicle where the defendant was in the passenger seat, and he  
20 heard the defendant, the only other person in the car, he heard  
21 the distinct sound of the defendant racking the slide of his  
22 pistol. Because he was driving, watching the road, he heard  
23 the sound, he didn't see it. So, obviously this involves  
24 firearms, it involves firearms in the courtroom, and so I would  
25 like to, with the Court's blessing --

1 THE COURT: Make the sound?

2 MS. KRASINSKI: Make the sound. Obviously, the  
3 firearms will not be loaded; both the FBI and the Marshals will  
4 ensure that they are rendered safe before they are brought into  
5 the courtroom. But I did not want to make the sound of racking  
6 a slide without notifying the Court first and making sure the  
7 Marshals were aware of it as well.

8 THE COURT: Thank you.

9 MS. KRASINSKI: So, I would like the Court's  
10 permission to do that.

11 THE COURT: Any objection to that, Attorney Faulkner?

12 MR. FALKNER: No.

13 THE COURT: Okay. All right. Thank you for the  
14 advance notice.

15 All right. Attorney Faulkner, any other issues you  
16 can think of that you might want to bring to my attention now  
17 so I can have the benefit of thought, research?

18 MR. FALKNER: Yes. There were two issues with Peter  
19 Dugay, and, now that I'm looking at my notes, I addressed one  
20 of them with the government, and they agreed not to be  
21 eliciting the testimony that Mr. Dugay had told federal  
22 investigators that at some point he asked Mr. Irish to -- or  
23 Irish at some point took possession of Mr. Dugay's rifle for a  
24 short period of time and then returned it. I don't remember  
25 who asked who. But that was, essentially, the line of



1 questioning. The government does not intend to elicit that. I  
2 should have at the same time conferenced with the government,  
3 and I didn't have a chance to. Mr. Dugay says that at some  
4 point Mr. Irish had a lower receiver from an AR and explained  
5 how the rest of the rifle could be built. I don't think  
6 there's any evidence that that's the lower receiver from this  
7 AR, because I don't think there's any testimony that this one  
8 at any relevant point in time was anything other than fully  
9 constructed. But that clearly would be 404(b) evidence, and so  
10 I just -- I don't whether the government intends to elicit it  
11 and it's something that I may need to file a further motion *in*  
12 *limine* as to.

13 MS. KRASINSKI: We don't intend to elicit it, your  
14 Honor.

15 THE COURT: All right. That makes it easy.

16 MR. FALKNER: Perfect.

17 THE COURT: All right. So, both those issues the  
18 government's agreeing not to ask about that.

19 MS. KRASINSKI: Correct, your Honor.

20 THE COURT: All right. Let's start with the 404(b)  
21 Document Number 16, and my understanding is that Attorney  
22 Faulkner wants to keep out the 2014 convictions for false  
23 statement and also -- is it just the false statement  
24 conviction, or is it also the charge, the conviction for --  
25 that was a false statement as well. The girlfriend or wife is

1 a straw purchaser. Those two convictions in 2014?

2 MR. FALKNER: Right. And I think the issue isn't the  
3 convictions themselves but the conduct underlying it. And so,  
4 it's my understanding that the government -- and I guess the  
5 reason why I filed this as a motion *in limine* is the government  
6 has indicated that it does not intend to elicit this evidence  
7 unless the defendant opens the door, and I'm not quite sure in  
8 the context of this case, and even in the context of their  
9 response, exactly what that means.

10 In this case at the very least Mr. Irish made a  
11 statement to Mr. Dugay that the 1911 belonged to Stephanie  
12 Irish, and there's some evidence that the jury could either  
13 interpret it as her sole possession or joint possession, and  
14 there's evidence that when she leaves the house he tries to get  
15 the firearms out of the house. And so, the question I have is,  
16 all that was established in the previous case with regard to  
17 Stephanie Irish is that he sent her to a store to buy a firearm  
18 on his behalf and that was a lie. So, we've got one occasion  
19 in the past six or, you know, five to six years before the  
20 conduct in this case where she's used her name, she has used  
21 her name falsely at a store to purchase the firearm. The  
22 contention in this case is that she actually does possess these  
23 firearms, and if Mr. Irish were to testify it certainly may be  
24 possible that some of this evidence comes in, but simply  
25 cross-examining the government and holding -- or the

1 government's witnesses and holding the government to its burden  
2 of proof as to whether it's proven that these guns were in the  
3 possession of Mr. Irish versus Mrs. Irish doesn't seem to me to  
4 be sufficient to open the door to this kind of evidence that  
5 the government intends to elicit, and I'm concerned that by  
6 simply eliciting that evidence they're going to be considered  
7 opening that door, and I'm just trying to get some guidance  
8 from the Court to make sure that I'm not crossing any lines  
9 that open the door to that evidence.

10 THE COURT: Okay. How would he be opening the door to  
11 this?

12 MS. KRASINSKI: So, I don't think standard, you know,  
13 cross-examination on whether or not the witnesses know whether  
14 the defendant possessed it or if it was his wife's, I don't  
15 know that I think that opens the door.

16 THE COURT: You just can't predict what might happen;  
17 is that what you're saying?

18 MS. KRASINSKI: Exactly.

19 THE COURT: Yeah.

20 MS. KRASINSKI: And what I can tell your Honor is  
21 that, if something happens where we think the door has been  
22 opened, we'll ask to approach. We'll discuss it with your  
23 Honor. Honestly, I don't have an example of what a question  
24 would be that would open the door, but I didn't want to fail to  
25 notify, fail to include it in a 404(b) notice and then have

1 something unanticipated happen at trial and be limited.

2 THE COURT: Okay. It sounds like it's not going to  
3 come in. It is extremely prejudicial, so even if it becomes  
4 relevant, if somehow the door is opened, I would still have to  
5 do a 403 analysis.

6 So, I think this one seems doubtful, Attorney  
7 Faulkner, but I think there are ways where you could create a  
8 misleading misimpression somehow, and then the government  
9 approaches, I weigh that, and I decide whether or not that  
10 needs to be cured and whether or not the prejudice is still so  
11 great that the cure is not probative enough. So, I would do  
12 all of that in the context of whatever would happen, but I just  
13 don't see you creating some obviously misleading impression  
14 that will then make this somehow relevant.

15 So, I'll put this one to the side, and I appreciate  
16 you both alerting me to that.

17 Now, we've got photographs and we've got something  
18 from Mr. Irish's phone. Let's start with the photos, and I'm  
19 going to be honest. I have a hard time just understanding how  
20 these photos come in. I can see -- the problem is the jury's  
21 going to see the photos, the jury's going to hear that the  
22 officer received them on the 27th, a relevant time date, but  
23 there's no testimony about when the photo was taken, and so I  
24 just see the jury looking at the photo and assuming that this  
25 was taken now and is relevant now and was taken by Ms. Irish at

1 the relevant time, but ultimately what you're introducing it  
2 for I think, as you describe, is just to simply describe the  
3 narrative, how did this case start, and I think these photos  
4 are problematic in terms of the potential for confusion and  
5 potential for misleading the jury and also potential prejudice.  
6 That's just my take on reading the paragraph and then your  
7 attempt to justify authentication of these photos, but I'm  
8 having trouble with that. I understand your argument. He's  
9 going to recognize an item in the photo, but, still, I have  
10 some serious concerns about admitting the photo.

11 MS. KRASINSKI: I understand that, your Honor. I have  
12 to say, when I was looking at it and talking about it and  
13 thinking about how to discuss how the case investigation was  
14 initiated, testimony that he received -- that I received  
15 photographs from Stephanie Irish. He can describe, "One of  
16 them included a firearm that I knew to be the firearm that I  
17 had seized from the defendant who had given it to Roscoe  
18 Whitney."

19 If the jury doesn't see the photographs they might  
20 actually think they are more or worse than what they are. I  
21 mean, here it's clear I don't think that -- I mean, we would  
22 elicit testimony that, "You don't know when these were taken."  
23 These don't put the firearms in his hand. It is just what  
24 initiated the investigation.

25 My broader concern, if we don't use the photographs,

1 is that the jury has some idea in their mind that the  
2 photographs are more than what it is they actually are.

3 THE COURT: Let me hear from Attorney Faulkner on  
4 that, because, obviously, if you think that's more  
5 prejudicial --

6 MR. FALKNER: Your Honor, frankly, the testimony that  
7 the government is describing here in this courtroom I think is  
8 as problematic as the photos themselves, because, in essence,  
9 it's one thing for the FBI to testify, "We were concerned" --  
10 or, "We received information that Mr. Irish might be in  
11 possession of firearms," something generalized to that degree.  
12 But now they want to specify that that information came from  
13 Stephanie Irish without putting Stephanie Irish on the witness  
14 stand and essentially amounts to an accusation by Stephanie  
15 Irish that Jonathan Irish is in possession of the firearms,  
16 which is the very question that the jury is to decide.

17 THE COURT: I'm going to keep the photographs out.  
18 They're just too problematic and not relevant or probative  
19 enough, and obviously Attorney Faulkner is not concerned about  
20 the prejudice that you were just talking about.

21 MR. FALKNER: But I'm also concerned about the  
22 testimony, your Honor, that was just described. I realize it  
23 wasn't part of the motion, but the government's proposition  
24 that the agent be testifying that Stephanie Irish is the person  
25 that suggested that he was in possession of firearms to the

1 FBI.

2 THE COURT: How does that come in? How is it not for  
3 the truth of the matter?

4 MS. KRASINSKI: We're not going to elicit testimony of  
5 what she said, but I think the fact that on December 26th Agent  
6 Christiana can say, "I received a phone call from Stephanie  
7 Irish on December 27th. I received photographs from Stephanie  
8 Irish. One of the photographs contained a firearm that I was  
9 familiar with. In light of the circumstances, my knowledge of  
10 the defendant, he is the -- "

11 THE COURT: I get it. I get that that's what he's  
12 going to testify she said to him. What's the exception?

13 MS. KRASINSKI: He's not going to testify what she  
14 said. The fact that he spoke to her, the fact that he received  
15 photographs, none of that's hearsay, so there's no exception  
16 needed.

17 THE COURT: Okay.

18 MS. KRASINSKI: The fact that he got photographs on  
19 his phone and the photograph is of something that he  
20 recognizes, he recognizes that specific firearm, he recognizes  
21 that specific vehicle as a vehicle that he has seen the  
22 defendant driving in the past, and because he is the same agent  
23 that seized those firearms from the defendant in 2013, he's the  
24 same agent that released this firearm to Roscoe Whitney, he  
25 sees all of this and he says, "Okay, I'm going to assign an

1 agent to investigate whether or not the defendant is in  
2 possession of these firearms."

3 THE COURT: Right. There is content there that is  
4 conveyed to the jury about what essentially this witness who is  
5 not going to testify as saying, and he doesn't have an  
6 opportunity to cross-examine Irish or confront her.

7 MS. KRASINSKI: But him saying, "I spoke to someone,"  
8 without revealing the contents of what she said --

9 THE COURT: Why can't he just generally testify, "I  
10 learned and became concerned, so I started my investigation"?  
11 Why do you need all of those details? Why couldn't he just  
12 generally describe his renewed investigation?

13 MS. KRASINSKI: Because it relates, in particular, to  
14 this firearm that was the defendant's, was released to  
15 Mr. Whitney, and now is the same firearm that was seized and we  
16 allege --

17 THE COURT: Then, call Ms. Irish and put her on, and  
18 she can talk about the photos, she can identify it, she can  
19 talk about when she took it, and all of that then becomes  
20 something he can confront. But, as it is, you're describing  
21 something that you're saying is not that relevant, it's just  
22 part of the story, "I want to tell the jury how he began his  
23 investigation;" but the risk, on the other hand, is that the  
24 jury is implying all kinds of testimony from Ms. Irish about  
25 the guns, the photo, the fact that Mr. Irish does certainly



1     imply that she's trying to rat him out somehow and that he's  
2     possessing weapons, and that's the very issue in the case. So,  
3     without her testifying I don't see -- I think that's too -- I  
4     mean, I think what he's doing is testifying essentially to  
5     hearsay without maybe exactly saying what she's telling him, by  
6     the way you're describing the testimony. So, it seems to me  
7     that you would need Ms. Irish to get these photos in and to get  
8     that conversation in under some hearsay exception.

9             MS. KRASINSKI: So, I want to make sure that I don't  
10    cross any lines when I have Agent Christiana on the stand, that  
11    he received a call from someone he knew.

12            THE COURT: He received a call. It alerted him that  
13    he wanted to investigate this. However you want to elicit that  
14    from him without bringing in the whole story of Ms. Irish, who  
15    is a witness who is, as I understand it, not going to testify,  
16    then it seems to me it obviates this confrontation problem.

17            MS. KRASINSKI: Okay.

18            THE COURT: Okay. And maybe just let Attorney  
19    Faulkner know how you're going to do that with the witness so  
20    he's prepared and doesn't -- I think he could open the door to  
21    it if he starts challenging Officer Christiana about how he  
22    came to learn that he should be investigating this.

23            MS. KRASINSKI: Yes, your Honor.

24            THE COURT: Okay. So, essentially the photos are out,  
25    and the testimony about the photos and the conversations with

1 Ms. Irish, even obliquely referenced, that is all out.

2 All right. The information from Mr. Irish's phone  
3 seems to me of limited probative value. I'm not sure how it's  
4 prejudicial. So, go ahead, Attorney Faulkner. How is that  
5 prejudicial that he would be looking that up?

6 MR. FALKNER: Your Honor, so the download to the phone  
7 occurs, according to the phone records, on -- just a moment.  
8 Reviewing the trial exhibits, the extraction report to the  
9 phone indicates that on December 13th of 2019 a document  
10 entitled "Quick Facts Felon in Possession of a Firearm" was  
11 downloaded to the phone. The firearms in this case were seized  
12 from Gary Roy a just after Thanksgiving, so about two weeks  
13 before. I expect there to be a decent amount of testimony that  
14 Mr. Roy a knows Jonathan Irish's mother very well and, indeed,  
15 that Mr. Irish's mother and/or Mr. Irish had conversations with  
16 Mr. Roy a about those firearms being seized, and, again, there's  
17 going to be a fair amount of testimony that those firearms came  
18 out of Mr. Irish's house.

19 And so, what I would suggest is -- and, again, we're  
20 not challenging the fact that he was, indeed, a felon and that  
21 he knew he was a felon, and certainly, knowing that he's a  
22 felon, these firearms which had come out of his house, had just  
23 been seized by federal agents and that the federal agents were  
24 interviewing people about the source of the firearms, and  
25 shortly before his arrest he downloads a document to determine

1     what are the penalties for this crime that he may well be  
2     charged with, I'm not sure that that demonstrates a  
3     consciousness of guilt as opposed to simply telling the jury,  
4     again, presupposes just what the crime is and just what it is  
5     they are to decide. It doesn't give any insight as to whether  
6     he -- all it gives insight into is whether he's concerned that  
7     he may be charged with this. Well, that's a very valid  
8     concern, given all the circumstances, very few of which he's  
9     even contesting.

10           THE COURT: Let me hear from the government. I think  
11     it does -- I mean, it's probative on consciousness of guilt,  
12     but somebody who is just also wanting to look at risks of being  
13     charged with something like this might look that up, that seems  
14     an argument you make to the jury, but it seems minimally  
15     probative. I'm not seeing how it's particularly prejudicial.

16           MR. FALKNER: Perhaps the document itself should also  
17     come in.

18           THE COURT: Maybe I should look at that. Were you  
19     planning on introducing that?

20           MS. KRASINSKI: I wasn't, your Honor, because -- I did  
21     bring a copy today. It relates to the penalties and, given  
22     that penalties are not in the purview of the jury --

23           THE COURT: Yeah.

24           MS. KRASINSKI: May I approach?

25           THE COURT: Do you have other evidence of

1 consciousness of guilt?

2 MS. KRASINSKI: We do, your Honor. In this time frame  
3 and after the firearms were out of his physical possession he  
4 and his mother sort of made this scheme to look like the  
5 firearms were never in his possession. So, our evidence will  
6 be that the firearms went from the FBI to Roscoe Whitney, back  
7 into the defendant's household, and then from the defendant to  
8 his cousin Neil Prive, and then from Mr. Prive to who they were  
9 ultimately seized from, Gary Roy.

10 After that transfer occurred the defendant's mother  
11 sent Gary Roy a document to have him sign indicating that the  
12 firearms were transferred to him directly from Roscoe Whitney,  
13 and we anticipate both Roscoe Whitney and Neil Prive will say  
14 that that's false, that the transfer occurred approximately a  
15 month earlier than the actual transfer, that the defendant  
16 asked Roscoe Whitney to lie to federal agents about whether or  
17 not the firearms ever left his possession and was inquiring of  
18 other witnesses whether or not they were talking to federal  
19 informants.

20 In fact, on a relatively recent jail call the  
21 defendant directed his aunt to tell Mr. Prive, in his words,  
22 I'm not sure I'll get them exactly accurate, "The Duke boys  
23 stick together," which Mr. Prive understood to mean the  
24 defendant instructing him not to testify or not to testify  
25 truthfully. So, it's in the context of that broader conduct.

1 MR. FALKNER: Your Honor, I expect there to be a  
2 substantial amount of potential consciousness of guilt evidence  
3 coming in as part of the government's case. I don't know that  
4 this -- it just seems, given the evidence that they intend to  
5 elicit and the scope of it, this just seems to add almost  
6 nothing to the mix, and, in particular, just given that it  
7 relates specifically to the crime at issue I think that it's  
8 unfairly prejudicial.

9 THE COURT: Well, that's exactly why it's probative,  
10 too, ultimately, because the government's arguing he's aware  
11 he's going to be charged with this, he's concerned about  
12 possession. This won't come in. This document won't come in.  
13 But I think ultimately this is so -- I think that it shows some  
14 consciousness of guilt, and I think the consciousness of guilt  
15 that it shows is also, frankly, the same prejudice. And the  
16 prejudice is not just any prejudice; it has to outweigh the  
17 probative value. And I will weigh that, I think, in the middle  
18 of the trial, but, as I sit here, I see this one as coming in,  
19 but I'd like to make that ruling at the time in the context of  
20 all of the other evidence that the government just laid out,  
21 but I could also see in the moment deciding that it just isn't  
22 moving the needle in either direction or certainly not moving  
23 it significantly enough to inject the prejudice into the case.  
24 So, I really want to rule on this I think in the context of the  
25 trial, but, as I sit here, I think I would probably allow it

1 in.

2 MR. FALKNER: Can I just -- I understand your Honor is  
3 not making a ruling now. Just I think a couple of points for  
4 consideration are that the title of the document coming in  
5 without the document itself potentially invites the jury to  
6 speculate as to what the document is. And one of the reasons  
7 -- there's obviously issues with the document itself coming in,  
8 but the document itself is from the United States Sentencing  
9 Commission as opposed to, you know, something else that could  
10 have been found on the Internet from --

11 THE COURT: Right.

12 MR. FALKNER: -- some kind of fringe group or something  
13 like that.

14 THE COURT: So, what does that show? I'm saying the  
15 document definitely is not coming in. You're saying --

16 MR. FALKNER: My point is, though, that showing just  
17 the link to the name of the document without the document  
18 invites the jury to speculate as to what the document may be as  
19 opposed to a document that's produced by the United States  
20 government, instead the jury --

21 THE COURT: They're not going to get into that. They  
22 would just simply -- as I understand, the government's going to  
23 offer that they found it on his phone. It was just a link  
24 describing "Quick Facts About Felon in Possession." But  
25 there's no -- I would not permit detailed testimony about that.

1 MR. FALKNER: I'm not expecting that. My concern,  
2 your Honor, is that, if the jury knows the name of this  
3 document but does not know the source of the document, they're  
4 invited to speculate as to what the document may actually be.  
5 The jury doesn't know that this is a U.S. Sentencing Commission  
6 document, like I said, as opposed to, for instance, they may be  
7 speculating that it may be from some kind of gun rights group  
8 or something like that or from an illegal source.

9 There's also no kind of indication as to how it was  
10 downloaded, whether it was sent onto his phone or any other  
11 information. So, I think there's a lot of speculation that  
12 comes along with -- just bringing the fact that a document with  
13 that title was downloaded to his phone invites an awful lot of  
14 speculation in the jury that doesn't need to be there.

15 THE COURT: I'm not seeing that particularly as  
16 persuasive. The fact that he did a search looking for facts  
17 about felon in possession is essentially what the evidence  
18 would tend to show.

19 MR. FALKNER: We don't know that he did a search. We  
20 just know that a document with that title was downloaded to his  
21 phone. We don't know that there was a search done for those  
22 facts. That's exactly, I think, one of the problems here.  
23 There's nothing about this --

24 THE COURT: I thought you knew the exact date and you  
25 knew some information about the time at which he had downloaded

1       this to his phone.

2               MR. FALKNER: We know about the date that it was  
3       downloaded, but we don't know how it arrived on the phone. We  
4       don't know whether it was downloaded because somebody else sent  
5       it to the phone and it was downloaded or a Google search was  
6       done and it was downloaded. We just know that a document by  
7       the name of "Quick Facts Felon in Possession of a Firearm.Pdf"  
8       was downloaded to the phone at a specific date and time, and  
9       that's it. So, there's no indication of how it came to be on  
10      the phone whatsoever.

11             THE COURT: Tell me why that's important, why that  
12      would exclude just the fact that this was found on his phone on  
13      the specific date.

14             MR. FALKNER: Well, again, I guess I will just point  
15      out -- so, for instance, your Honor was speculating as to how  
16      it came to be on his phone, did he do a search for it and  
17      things like that, and my concern is that the jury does exactly  
18      that. There's all kinds of speculation as to how it came to be  
19      on the phone, the source of the document, what the document  
20      actually is, and without knowing what this document is the jury  
21      just knows that a document by that title is on the phone. They  
22      don't even know what it is. They don't know that he searched  
23      for it. They don't know any of that information.

24             THE COURT: Right. There's a limited universe of  
25      things, ways in which this could have gotten on his phone. He



1 could have found it on the Internet, somebody could have sent  
2 it to him, but it's on his phone on a certain date. I've told  
3 you that I want to make a decision in the context of the trial,  
4 and ultimately some of your arguments may become more  
5 persuasive in the context of the trial. So, that's where I am  
6 with regard to that issue.

7 Does the government want to say anything else about  
8 that?

9 MS. KRASINSKI: The only thing is in the context of  
10 flight -- obviously, there's not much case law on consciousness  
11 of guilt and internet downloads. In the context of flight what  
12 the Court does is instruct the jury that one inference the jury  
13 can draw from it is consciousness of guilt, but that there are  
14 also other inferences the jury can draw from it. If the Court  
15 allows it in and the defendant requests such a limiting  
16 instruction, there are other reasons that this could have been  
17 downloaded onto the phone and it is up to the jury to determine  
18 whether or not it is the --

19 THE COURT: That's just making me more concerned about  
20 admitting it, frankly. If it's going to raise concerns,  
21 ultimately it's of such minimal, I think, probative value that  
22 ultimately I think in the context of the trial I may just  
23 decide that it's just not coming in.

24 MS. KRASINSKI: Yes, your Honor.

25 THE COURT: All right. Anything further?

1 MR. FALKNER: No, your Honor.

2 THE COURT: All right. Anything further, Attorney  
3 Krasinski?

4 MS. KRASINSKI: Just give me one minute, your Honor.

5 THE COURT: And if you want to brief any other issues  
6 that we've discussed today in your brief, feel free to do so.

7 MR. FALKNER: Thanks, your Honor.

8 MS. KRASINSKI: Nothing, your Honor. Thank you.

9 THE COURT: All right. Thank you, Counsel. Court is  
10 adjourned.

11 THE CLERK: All rise.

12 (WHEREUPON, the proceedings adjourned at 11:14 a.m.)  
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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of United States v. Johnathon Irish, No. 19-cr-251-01-LM.

Date: 3/27/20

/s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter